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IN THE

Supreme Court of the United States

October Term, 1958

No. 513

SAM COURTNEY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Sam Courtney, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered August 20, 1958, petition for rehearing denied October 14, 1958, in the matter entitled United States of America v. Sam Courtney, Docket #24776, affirming the conviction of the defendant in the United States District Court for the Southern District of New York upon an indictment for the crime of perjury, 18 U. S. C. Section 1621.

Opinions Below

The case was tried in the District Court before Hon. Archie O. Dawson, U. S. D. J., and a jury. No opinion was rendered. The opinion of the Court of Appeals for the

Second Circuit is printed as Appendix "A" hereto and is not yet officially reported. A timely petition for rehearing was presented to the Court of Appeals and was denied without opinion on October 14, 1958.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered October 14, 1958 (see Appendix D). The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1) and Rule 22 (2) of the Rules of the Supreme Court of the United States.

Questions Presented

1. May a prosecutor call to the attention of a trial jury the fact that the defendant had previously refused to answer questions put to him before a Grand Jury?

2. In a prosecution for perjury, may the Trial Court reach a finding that the allegedly perjured testimony was "material" based solely upon a statement that the Grand Jury was investigating violations of certain statutes, absent any actual proof of how or why the allegedly perjurious testimony was relevant or material to the Grand Jury investigation?

3. If the question of materiality is solely for the Court to determine, is it proper to hear evidence bearing on the issue of materiality in the presence of the trial jury; where that evidence is highly prejudicial to the defendant, does not the requirement of fairness in the conduct of Federal criminal trials require that this testimony be received by the Court in the absence of the jury?

4. If the question of materiality is a mixed question of fact and law, may the trial court rule on the entire quesiton of materiality without submitting the factual portion of the question to the jury?

5. Is the two-witness rule applicable in perjury prosecution satisfied by the testimony of multiple witnesses, where the testimony of each witness standing alone does not establish falsity and where their testimony is not corroborative of the testimony of the others?

Statute Involved

The statutory provision involved is Section 1621, title 18 of the U. S. Code, printed as Appendix "B" hereto.

Statement of the Case

The petitioner, Sam Courtney, is a partner in the Courtney Trucking Company, which operates locally in the garment area of New York City. On five occasions, the petitioner was subpoenaed to testify as a witness before a special Grand Jury impanelled in the Southeren District of New York, which was investigating "racketeering" in the garment and trucking industries, possible violations of the Taft-Hartley Act, possible violations of the Anti-Racketeering Act, violations of the Federal Income Tax laws and possible links between the underworld and the garment and trucking industries (D.A. 53-4).[1]

[1] "D.A." refers to the record abstract printed as the defendant's appendix in the Court of Appeals. "R." refers to the stenographic minutes of the proceedings in the District Court.

As a result of his testimony before that Grand Jury, on June 26, 1956, the petitioner was indicted and charged with ten counts of perjury (D.A. 3-17).

Although petitioner's testimony before the Grand Jury was very lengthy, the charge of perjury is predicated entirely upon two of his answers. These answers related to the expenditure of a small amount of money by the Courtney Trucking Company during the week ending June 22, 1956 (D.A. 3-4). For the convenience of the Court, the first count of the indictment is set forth *infra* as Appendix "C". The remaining nine counts of the indictment are similar to the first count with unimportant variations (D.A. 6-17).

In the Grand Jury, the defendant testified that a portion of the expenditure of Courtney Trucking Company during the week of June 26, 1956, was for gratuities paid to the elevator operators of certain buildings in New York City and to the employees of packing houses (Exh. 2). These gifts were distributed, according to the petitioner, in order to facilitate the handling of the shipments of Courtney Trucking Company (*Id.*) Pressed for particulars in the Grand Jury, the petitioner named five buildings at which he had distributed gratuities and five packing houses where he had made gifts to employees (*Id.*)

After identifying the buildings and packing houses, the petitioner was asked to name the specific persons to whom he had made gifts. The petitioner refused to answer (Exh. 2).

Thereupon, the government proceeded to prosecute Mr. Courtney for the crime of contempt. The petitioner was convicted and sentenced to a term of imprisonment.

On appeal, the Court of Appeals reversed this conviction, holding in *United States* v. *Courtney,* 236 F. (2d) 921; that the petitioner had properly asserted his constitutional privilege against self incrimination. This decision was rendered on Sept. 20, 1956. On February 19, 1957, the government filed the instant indictment charging the defendant with the crime of perjury. The ten counts set forth in the indictment were arrived at by dividing each of two of the defendant's answers into five component parts.[2]

Since the petitioner in the Grand Jury had identified the buildings at which he made payments but had refused to identify persons to whom the payments were made, the prosecution attempted to prove the falsity of petitioner's testimony by showing that he had never made payments to any employees at the buildings identified. Thus, the government called groups of employees from each of the ten buildings in question. The testimony of each group related to a different count of the indictment and the testimony of each group was substantially the same as the testimony of any other group. With respect to the first count of the indictment which related to a building at 463 Seventh Avenue, in New York City, the government called seven freight elevator operators, each of whom testified that during the week of June 22, 1956, he had not received

[2] The defendant testified in the Grand Jury that he had visited 462 7th Avenue, 463 7th Avenue, 1375 Broadway, 1400 Broadway and 501 5th Avenue in the week ending June 22, 1956. This answer formed the basis for counts one through five of the indictment, each of which referred to one of those buildings. The same technique was utilized with respect to five "packing houses" identified by the petitioner in his Grand Jury testimony, which packing houses formed the subject matter of counts six through ten of the indictment.

any gratuity from the petitioner. A similar procedure was followed with respect to each of the other counts, although with respect to some, the government was not able to produce all the operators employed during that particular week.

In addition to the testimony of these witnesses, the government produced four additional witnesses. Two were agents of the Federal Bureau of Investigation, one was the petitioner's accountant and one a bookeeper. Their testimony was of little significance and did not tend to corroborate the testimony of the building employees (R. 491, R. 296, R. 705, R. 763).

The government produced one further witness, the foreman of the Grand Jury, before which the petitioner had testified, for the purpose of showing the materiality of the allegedly perjured testimony (D.A. 51-7). The testimony of this witness was exceedingly brief and consisted simply of a statement that the Grand Jury was investigating racketeering, union payoffs, extortion, income tax violations and links between the underworld and industry (D.A. 53).

Upon the basis of this bare statement of the subject matter of the inquiry, the Trial Judge ruled, as a matter of law, that the materiality of the allegedly perjurious testimony was proven and left to the jury the decision of two questions only (D.A. 416).

> "1. Was the testimony given by the defendant false, and
>
> 2. Did the defendant give the testimony, knowing it to be false, and with the wilful intent to give false testimony to the Grand Jury?"

This instruction is believed to be erroneous in the light of the trial testimony.

The Trial Court likewise erred in its charge on the subject of the "two-witness" rule. In this connection, the Trial Judge warned the jury that in order to convict the defendant of perjury

> "the facts must be established by the Government by the direct testimony of two independent witnesses whose testimony you, the jury, believe to be true, or by the testimony of one such witness plus proof of corroborating circumstances, and which, in your minds corroborates the testimony of the one direct witness beyond a reasonable doubt" (D.A. 425).

This instruction undoubtedly left the jury with the impression that there was in the record single-witness, direct testimony of falsity—which there was not. It did not direct the juror's attention to any evidence which would be competent as corroboration, and it left them free to consider the testimony of one building employee witness as corroborative of another, or even to consider the evidence adduced in support of one count of the indictment as corroborative of the others (D.A. 425-8).

It was also urged in the court below that incurable error was committed at the very outset of the trial when the prosecutor informed the trial jury that the petitioner had been asked to name the persons to whom he had made payments and that he had refused to answer these questions before the Grand Jury (D.A. 47). This, of course, was a reference to a refusal already sustained by the Court of Appeals as a valid exercise of petitioner's privilege against self-incrimination. An immediate motion for a mistrial was denied.

Only one of the questions here presented was made the subject of an opinion in the Court of Appeals. That Court holding that the prosecutor's error in referring to petitioner's claim of privilege was cured by an instruction of the Trial Court. The remaining questions—raised in the petition for rehearing—were passed upon without opinion.

Reasons for Granting the Writ

A. The Use By The Prosecutor Of The Petitioner's Previous Assertion Of His Constitutional Privilege Against Self-Incrimination.

In his opening, the prosecutor informed the trial jury that the petitioner had refused to answer questions put to him in the Grand Jury. This was a reference to a claim of privilege already sustained by the Court of Appeals as a proper invocation of petitioner's rights under the Fifth Amendment [see *United States* v. *Courtney* (2 Cir. 1956) 236 F. 2d 921].

An immediate motion for a mistrial was denied by the Trail Court (D.A. 47-9). The Trial Court instructed the jury that

> "whether he has refused to answer has nothing to do with this case"

that:

> "the only question we have here is whether he gave false testimony before the grand jury"

and that:

> "The witness under certain circumstances has a perfect right to refuse to answer questions before the grand jury".

At the same time, however, the Court told the jury that:

> "anybody who appears before any grand jury is sworn to tell the truth, *is supposed to tell the truth*". (Emphasis added)

At no point did the Trial Court inform the jury that a claim of privilege may be entirely consistent with innocence and that its exercise does not indicate that the witness is concealing guilty knowledge.

The Trial Court's refusal to declare a mistrial after the jury had been improperly apprised of the defendant's claim of privilege and the Court of Appeals' sanction of the conviction so obtained are in conflict with the priniples enunciated by this Court in *Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Grunewald* v. *United States*, 353 U. S. 391 and *Ullman* v. *United States*, 350 U. S. 422.

The petitioner was on trial for the crime of perjury allegedly committed in an investigation which the jury was told involved "racketeering". To inform the trial jury sitting in such a case that the defendant had refused to answer questions was to inform them that he had sought refuge in the Fifth Amendment. Unfortunately, as this Court has noted, the invocation of a witness' constitutional privilege carries with it to the layman the impression that the witness is either committing perjury or concealing evidence of guilt (*Ullman* v. *United States*, 350 U. S. 422).

Either inference was fatal to the petitioner's right to due process of law and a fair trial. If the first inference was drawn, namely, that the petitioner had committed perjury in claiming his privilege, the prosecution had won

its case during its opening. For it was hardly likely that a jury already convinced that petitioner had committed perjury in one respect would fail to convict him of the perjury charged in the indictment. If the jury drew the second inference, that the petitioner was concealing evidence of wrongdoing, the petitioner was in equally bad case. For if there was something illicit about the payments made by the petitioner, it must follow that his innocent explanation of the payments was false. This was the very issue to be resolved at the trial.

The case at bar represents a fourth facet of the problem presented by the invocation of a witness' constitutional privilege against self-incrimination. In the *Ullman* and *Slochower* cases this Court noted the lamentable tendency to view the invocation of the Fifth Amendment as a confession of wrongdoing and struck down a teacher's discharge predicated upon the drawing of an inference of guilt from the assertion of the constitutional privilege.

In the *Grunewald* case, this Court condemned the use in cross-examination of a prior claim of constitutional privilege upon the ground that its prejudicial impact upon a trial jury far outweighed its probative value.

In the case at bar the Government has taken a step in another direction and attempted to use a witness' refusal to answer not for purposes of impeachment but as part of its case in chief, with the avowed intention of demonstrating "consciousness of guilt" (D.A. 72) of explaining to the trial jury "why specific named witnesses will not be called" (D.A. 74) and of showing "motive and intent" (D.A. 78, 84).

In fact, the Government was not permitted to prove petitioner's refusal to answer. For when the proof was offered

the Trial Court excluded the evidence, recognizing its prejudicial quality (D.A. 73). Of course, the exclusion of the actual proof did nothing to cure the original error. The poison injected in the course of the opening had already done its work. But the refusal of the Trial Judge to permit proof of the petitioner's refusal to answer upon the ground that (D.A. 73)

> "it might be improperly prejudicial to the defendant to get that into this trial."

is itself eloquent testimony to the prejudice inherent in the prosecutor's opening statement.

The probability of prejudice to the defendant which moved the Trial Judge to exclude the proof, should equally have compelled the granting of defendant's original motion for a mistrial. This is particularly plain when, as here, the error is committed during the initial stages of the trial when the granting of the motion would have involved no more than an hour or two of delay while a new jury was selected. Certainly, a cautious regard for the rights of the defendant dictated the adoption of this procedure rather than to continue to judgment through a lengthy trial under the shadow of an error which brings the petitioner to seek redress even in this highest Court.

The decision of this Court in the *Grunewald* case was perhaps considered by the Court of Appeals as inapplicable to the case at bar by reason of the instruction given to the jury at the time of the prosecutor's comment. But this instruction—relied upon in the Court below—falls far short of eradicating the evil apprehended in the *Grunewald* and *Ullman* decisions.

The Trial Judge, of course, told the jury that a witness "under certain circumstances" has a right to refuse to answer questions. In our times this precept is known the length and breadth of the land. The significant fact which must be driven home to the lay juror is not that a witness may refuse to answer, but that the invocation of the constitutional privilege does not place the mark of Cain upon those who seek its shelter and is under no circumstance to be equated to some sort of admission of guilt. On this score the Trial Judge uttered not a word.

Nor can one speculate that the Court's bland instruction that petitioner's refusal to answer should not be considered by the jury was sufficient to counterbalance the tremendously prejudicial impact which has been judicially noticed by this Court.

Petitioner in the Grand Jury asserted a right upheld as a valid claim of his constitutional privilege. The exercise of constitutional rights should not be accompanied by apprehension that it may later provide a link in a prison chain or be utilized even in a peripheral manner to deprive the citizen of liberty. In this respect, prejudicial comment of a prosecutor regarding the assertion of a right under the Constitution stands on a footing far different from improper comment of the more common variety. For while the latter deprives the individual of liberty unjustly, the former not only deprives the individual of his freedom, but strikes a blow as well at the basic rights of all citizens. To permit a conviction to stand which may rest even in part upon a subversion of these rights is to tolerate a slow and subtle erosion of that which should stand like a bulwark for all.

In this context the case at bar is one which may well be regarded as presenting a problem of vital importance and wide applicability. It should be made clear once and for all that errors affecting the privilege against self incrimination cannot be lightly fobbed off nor cured by standardized placebo. Prosecutors in Federal criminal cases should be put on notice that a misuse of a defendant's assertion of constitutional rights may not be indulged in without leading inevitably to a denial of due process.

We note in conclusion that some reliance was placed by the Court of Appeals on the rejection by defense counsel of the Trial Judge's offer to instruct the jury that it should disregard the prosecutor's opening statement. This offer was made at the end of the trial. Few experienced defense counsel would have been willing at that stage to accept such a left handed gift which could not help but emphasize and refurbish the error. Defense counsel preferred silence and the slim hope that the edge of the prosecutor's comment had been in some measure dulled with the passage of time. Counsel was presented with a Hobson's choice. If he had asked for and received further instruction on the subject, the Court of Appeals would doubtless have noted that fact and advanced it as a reason why the conviction should be affirmed. Having refused the instruction he is held to have acquiesced to the error.

B. The Procedures Below With Respect to Proof of Materiality

The procedures followed in the case at bar with respect to the issue of "materiality" present important questions of Federal law which arise in every prosecution for the crime of perjury. These questions have never been passed

upon by this Court and the decision in the case at bar is in conflict with decisions of the Courts of Appeal of the Second, Fifth and Ninth Circuits.

The proceedings in the instant case relative to proof of materiality may be briefly summarized as follows.

On the issue of materiality, the Government called the Grand Jury foreman who testified in the presence of the trial jury. His testimony was of the briefest nature. Over the objection of defense counsel, this witness testified that the Grand Jury was investigating (D.A. 53):

> "* * * racketeering existing in the garment and trucking industries, to see whether there is any conspiracy to pay money to racketeers or union officials; to buy union protection, to explore any extortion payments, violations of the Taft-Hartley Act as it pertains to the paying of money to union officials; violations of the Anti-racketeering Act as it might pertain to extortion; violations of any Federal income tax laws; and principally to see if there was any criminal link between the underworld existing and the garment and trucking industries."

No other testimony on the subject of materiality was offered by the Government.

In its charge, the Trial Court held as a matter of law that the Grand Jury testimony of petitioner concerned a material matter and that the jury need only decide whether it was intentionally false (D.A. 422).

This method of dealing with the issue of materiality—now approved by the Court of Appeals for the Second Circuit—has never been passed upon by this Court. This despite the fact that it involves matters involving every

defendant in each Federal perjury prosecution. In the case at bar the rulings with respect to materiality were erroneous in three material aspects, raising the questions designated *supra* as questions 1, 2, and 3. Since these questions are closely related they will be treated together.

1. *The quantum of proof of materiality.*

If materiality is an element of the crime of perjury—as of course, it is—then it must be proven to the same extent as any other indispensable element of a crime (*Sinclair* v. *United States*, 279 U. S. 263, 296-7). It is not proven by a bare statement of the general nature of the crimes under investigation by the Grand Jury. Yet that is the only proof adduced in the case at bar.

We do not mean to indicate that there may not be situations in which the materiality of the allegedly false testimony clearly appears from evidence of the crimes under investigation. If, for example, a Grand Jury foreman testified that the jury was investigating the murder of John Smith on the night of July 4th, and the question asked the witness was whether he had had an argument with Smith early in the evening of July 4th. There would be no question of the materiality of the witness' testimony on that score. In such a case the connection is logically apparent, and a rational basis exists upon which to predicate a conclusion that the testimony in question is relevant and material.

Where there is no such logical connection between the subject matter of the investigation and the allegedly false testimony, the Government must go further and present additional evidence sufficient to provide a rational basis for a conclusion of materiality [*Luse* v. *United States* (9

Cir. 1031), 49 F. 2d 241; *United States* v. *Alu* (2 Cir. 1957), 246 F. 2d 29, 34].

In the instant case the Grand Jury foreman simply testified that the investigation concerned racketeering and similar crimes. The allegedly perjurious testimony related to the giving of two dollar tips to elevator operators. In order to pass upon the question of materiality the trier of that issue was compelled to resolve the question: "Is there evidence in the record connecting these tips with the matter under investigation?" The answer to that question must be, "No".

The only evidence was that the Grand Jury was investigating racketeering and that Courtney testified that he had paid gratuities to elevator men. The conclusion the Court drew from this evidence is a deduction of materiality. There is, however, no visible connection between the evidentiary facts proven and the conclusion. A decision holding one to be material to the other is necessarily predicated upon surmise and not upon proof beyond a reasonable doubt.

In the instant case the Court of Appeals has approved a finding of materiality based upon nothing more than a statement of the general nature of the grand jury inquiry. It's decision conflicts with the decisions of the Fifth Circuit in *Harrell* v. *United States* (5 Cir. 1955), 220 F. 2d 516, with the decision of the Ninth Circuit in the frequently cited case of *Luse* v. *United States* (9 Cir. 1931), 49 F. 2d 241 and, on analysis, with its own prior decisions in *United States* v. *Weber*, 197 F. 2d 237, cert. den. 344 U. S. 834; *United States* v. *Moran*, 194 F. 2d 623; *United States* v. *Hiss*, 185 F. 2d 822, 824, 828; and *United States* v. *Caroll*, 15 F. 2d 951, 953.

All of these cases either expressly or by implication recognize what was apparently overlooked in the instant case, namely, that a finding of materiality must rest upon proof of the exact state of the proceedings in which the allegedly perjurious testimony was given. This might include proof of the testimony of other witnesses already heard by the grand jury, proof of unsworn information or complaints received by the grand jury or more precise testimony regarding the connection between the subject matter of the investigation and the questions put to the witness. All of these are competent to establish the ultimate fact which the Court of Appeals for the Second Circuit has itself recognized as essential *i.e.* "the precise posture of the Grand Jury investigation at the time the defendant testified." (*United States* v. *Alu*, 246 F. 2d 29, 34.)

Quite often, indeed, the shoe has been upon the other foot when the Court of Appeals was called upon to sustain convictions wherein the defendants complained that too much evidence had been adduced upon the score of materiality and that its effect was prejudicial (see *United States* v. *Moran*, 194 F. 2d 623 and *United States* v. *Weber*, 197 F. 2d 237). We can see no reason why the Government should be permitted to carry water on both shoulders, contending in some cases that prejudicial evidence of prior proceedings is admissible because relevant to the issue of materiality and contending in others that to prove materiality it is only necessary to state the subject matter of the prior inquiry.

The latter contention implicit in the Court's affirmance of the case at bar is in direct conflict with the view expressed by the Fifth Circuit in *Harrell* v. *United States*, 220 F. 2d 516 and with *Luse* v. *United States*, 49 F. 2d 241

in which the Ninth Circuit Court wrote (p. 245) "Materiality depends primarily upon the issues involved in the former trial and upon the evidence adduced in support of those issues." We cannot fail to note that prior to this case substantial evidence on the subject of materiality is found in the leading Second Circuit cases although whether this stems from a complete endorsement of the principle or from mere chance is not plain (see *e.g. United States* v. *Hiss*, 185 F. 2d 822; *United States* v. *Weber*, 197 F. 2d 237; *United States* v. *Moran*, 194 F. 2d 623).

The rule which would appear to follow from the case at bar, that a mere statement of the subject matter of the investigation suffices as proof of materiality, may find some support in a comment of this Court in *United States* v. *Norris*, 300 U. S. 564 at p. 573 to the effect that:

> "The materiality of the respondent's false answers is clear in view of the scope of the inquiry."

In that case, however, there was evidence of materiality much beyond a mere statement of the matter under investigation. We do not believe that this passing remark was intended to sanction a finding of materiality based upon the slight quantum of proof adduced in the case at bar.

2. *Proving materiality in the presence of the trial jury.*

The second error vis-a-vis the subject of materiality lies in the province of whether proffered evidence of materiality should be heard in the presence of the jury or by the Court alone.

If the question of materiality is one wholly for the Court, then no reason exists why the testimony on this sub-

ject should be heard by the trial jury.[3] Particularly is this true since such testimony ordinarily consists of the record of the proceedings in which the allegedly perjurious testimony was given. And this frequently reveals the defendant to have been previously accused of crime, to be an alien, to be a bankrupt or to be cast in some other unfavorable light in the eye of the jury.

In the case at bar even the very sparse testimony offered regarding materiality tended to link petitioner to all manner of unsavory activities including "racketeering", "extortion", "conspiracy" and corrupt trade unionism.

To the mind of the layman on the jury it must surely have appeared that no Grand Jury would interrogate the petitioner on five different occasions unless he was in fact involved in these nefarious activities.

Because of the high incidence of prejudice likely to adhere to proffered evidence of materiality the Fifth Circuit has adopted the rule that such evidence should be heard by the Court alone in the absence of the jury. [*Harrel* v. *United States* (5 Cir. 1955) 220 F. 2d 516]. Prior to the decision in the instant case the Court of Appeals for the Second Circuit also indicated its approval of a procedure which would keep from the consideration of the trial jury prejudicial matter offered as proof of materiality [*United States* v. *Alu* (2 Cir. 1957) 246 F. 2d 29, 34].

The indictment in the instant case contained a reference to the fact that the Grand Jury before which the petitioner

[3] Indeed, in this regard the practise of taking this testimony before the trial jury conflicts in principle with the decisions of this Court regarding the proper handling of non-jury questions, *e.g.*, *McNabb* v. *United States*, 318 U. S. 332.

had testified was investigating "racketeering". This material was proper only as a statement tending to show the materiality of the petitioner's testimony. Accordingly at the outset of the trial a motion was made either to strike that reference from the indictment or to ensure that it was not brought to the attention of the jury during the trial. That motion was denied (D.A. 28-30). Upon the same ground an objection was raised to the sending of the indictment to the jury and similar objection was made to the testimony of the Grand Jury foreman (D.A. 52, 433). All these objections were overruled.

The Court of Appeals for the Second Circuit has accordingly held that where materiality is a question for the Court it is nevertheless proper—over the objection of a defendant—to place before the trial jury prejudicial material bearing only upon the issue of materiality.

In this regard its decision is in conflict with the decision of the Fifth Circuit in the *Harrell* case on a question of general applicability in perjury cases and in other Federal criminal prosecutions wherein questions are presented upon which the Trial Judge must reach factual conclusions.

3. *The Decision by the Trial Judge of a jury question.*

The decision of this case is in flat conflict, in another respect, with the decisions of the Fifth and Ninth Circuits in *Luse* v. *United States*, 49 F. 2d 241 and *Brooks* v. *United States*, 240 F. 2d 905.

In the case under consideration the Trial Judge heard the testimony of the Grand Jury foreman regarding the subject of that jury's investigation and charged as a matter of law that materiality had been proven. The Court

left no part of that question to the trial jury and the Court of Appeals has approved that procedure.

In the *Luse* case, however, it was held that materiality was a mixed question of law and fact, one portion of which must be submitted to the jury. This situation results, according to the *Luse* case, because of the necessity of proving the status of the prior proceedings. While the conclusion of materiality is one to be reached by the Court, the conclusion regarding this status may be made by the jury since it does not involve the resolution of any legal questions. So according to the Ninth Circuit:

> "Materiality depends primarily upon the issues involved in the former trial and upon the evidence adduced in support of those issues. What the evidence was, and what pleadings were upon that trial is a question of fact. Whether the testimony alleged to be perjured was material to these issues is a question of law."
>
> *Luse* v. *United States*, 49 F. 2d 241, 245.

Under this rule a proper charge on the subject of materiality would be: "If you find that the Grand Jury was investigating the robbery of the First National Bank and that the Grand Jury had information to the effect that the defendant was seen outside the bank shortly before the robbery, then I charge you that his testimony was material."

Applied to this case, that rule would have submitted to the trial jury the issue of the credibility of the Grand Jury foreman and left it to the jury to determine whether or not the Grand Jury was, in fact, investigating the crimes referred to by him. It may be said that there was no real issue raised concerning the credibility of this

tness. But if the *Luse* decision is correct even the clear- t of questions may not be withdrawn from the jury since, a perjury case, they involve an element of the crime which traversed by the plea of not guilty.

Identical in effect is the holding of *Brooks* v. *United ates* (5 Cir. 1957), 240 F. 2d 905, in which the conviction s reversed because of the failure of the Court to submit the trial jury the question of whether the person who ministered the oath was empowered to do so. In that se too there was little or no doubt how the jury would solve the issue.

There does not appear any reason why the jury in the esent case would have rejected the foreman's testimony untrue. But if his credibility was a jury question, then pointed out in the *Brooks* case it could not be withdrawn om the jury with impunity.

We do not wish to be understood to contend that the *se* case rule is correct. For this rule which holds ma- iality to be in part a jury question would require that testimony on the question of materiality be heard by trial jury. This often would result in the prejudice which we have previously referred. But we do point t that the rule in the *Luse* case is in conflict with that of *rrell* v. *United States*, 220 F. 2d 516. For the one re- ires that testimony of materiality be heard by the trial ry, and the other forbids it.

It should also be emphasized that the procedures en- rsed in the *Luse* and *Harrell* cases each have some ad- ntages for a defendant, while in the instant case the urt has adopted a procedure which joins all the disad- ntages of one to the disadvantages of the other.

The *Luse* rule gives to the defendant the advantage of posing an additional question to the trial jury which must be resolved in favor of the government before a conviction can be returned. The *Harrell* rule obviates the possibility that prejudicial testimony of materiality will be heard by the trial jury. But the procedure approved in the instant case sanctions the hearing of the evidence by the trial jury and simuntaneously prevents it from making any factual determination based on that evidence.

In summary it clearly appears that no uniformity exists in the various circuits regarding the proper method of dealing with this vexing problem. Nor has this Court as yet laid down an authoritative rule for the guidance of the courts below. Thus a defendant's conviction or acquittal may well turn upon the locus of the trial which may alternatively give him the advantage of one rule, the advantage of the other or, in the Second Circuit, the protection of neither.

These problems are inherent in all perjury prosecutions and are accordingly of wide importance to the due administration of justice in the Federal courts.

C. The Application of the Two-witness Rule

The application of the "two-witness" rule of perjury prosecutions in the instant case conflicts with the decisions of this Court in *Weiler* v. *United States*, 323 U. S. 606, 610 and *Hammer* v. *United States*, 271 U. S. 620 and appears to be in conflict with the decisions of the Eighth and Ninth Circuits in *Segal* v. *U. S.* (8 Cir. 1957), 246 F. 2d 814 cert. den. 355 U. S. 894, and *Arena* v. *U. S.*, 226 F. 2d 227, 237.

In this case, the Government's proof followed the same pattern with respect to each count of the indictment and

an analysis of the proof advanced in support of one count will serve to demonstrate the state of the proof regarding all of the charges. We will utilize the proof offered under the fifth count of the indictment as an example.

This count charged that the defendant lied when he testified before the Grand Jury that he had paid out money to freight elevator operators at a building known as 501 Seventh Avenue, in the week ending June 22, 1956 (D.A. 10).

To prove the falsity of the defendant's statement, the Government called eight elevator men, each of whom denied having received money from the defendant (Cooper R. 161, Bowen R. 209, Clukies R. 396, Ward R. 459, Brown R. 729, Santa Cruz R. 631, Thomas R. 339, Walsh R. 465).

The witness Walsh, by way of example, testified that he was a relief elevator operator at 501 Seventh Avenue and that he, personally, had never received any money from the defendant (R. 465-7). Standing alone this testimony did not prove the falsity of the defendant's Grand Jury testimony. Nor did the testimony of each of the other employees of that building—considered separately—prove that Courtney had lied.

Taken altogether, the joint effect of their testimony might be considered as direct proof of the falsity of the defendant's Grand Jury testimony. But it can only be effective as proof of falsity when considered *en masse*.

In short, the testimony of each elevator operator was only one link in a chain of proof. The entire chain only served to prove one ultimate fact, namely, that the defendant's testimony regarding 501 Seventh Avenue was false.

For the purpose of the two-witness rule, the testimony of these eight men was only the equivalent of one witness.

Clearly, the composite testimony of two or more witnesses, each of whom merely testifies as to a link in a chain of facts intended to show falsity, requires other corroboration before it may serve as the basis for a perjury conviction.

In the *Weiler* case, this Court reaffirmed its adherence to the rule that there must be a direct proof of falsity and that having offered such proof the government must proceed to produce trustworthy corroboration. This rule is sometimes difficult to apply since the mere fact that testimony comes from the lips of more than one witness does not import compliance with the rule if the multiple-witness testimony must all be considered together in order to draw the one conclusion of falsity (see *People* v. *Layman*, 117 Cal. App. 476, 4 P. 2d 242).

In the instant case the testimony of apparently numerous witnesses as to each count, in fact, was necessary to satisfy only the first requirement of the *Hammer* two-witness rule. The second requirement of trustworthy corroboration was never fulfilled.

Even if corroborating evidence were contained in the record the Trial Court wholly failed to instruct the jury regarding what evidence may be considered to have a corroborating effect. This lack of adequate instruction, of course, leaves the jury free to consider evidence as corroborating when in fact it is evidence necessary to support the preliminary finding of falsity. When the jury is left free to follow such a procedure, the two-witness rule is in effect removed from the case.

It is, we believe, for this reason that other circuit courts in affirming convictions attacked for non-compliance with the two-witness rule have specifically pointed out that the

Trial Court carefully separated the evidence bearing directly upon falsity from that which might be considered corroborating (*Arena* v. *United States,* 226 F. 2d 227, 237; *Segal* v. *United States,* 246 F. 2d 814).

The approval of a charge in which no such separation was made permits a conviction improper under the *Weiler* case, and which appears to be in conflict with the holdings implicit in *Arena* and *Segal, supra.*

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner

CHESTER E. KLEINBERG
Of Counsel

November 12, 1958

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 373—October Term, 1957.

(Argued June 6, 1958 Decided August 20, 1958.)

Docket No. 24776

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SAM COURTNEY,

Defendant-Appellant.

Before:

CLARK, *Chief Judge,* and
PICKETT and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York; Archie O. Dawson, *Judge.*

Defendant, Sam Courtney, appeals from a judgment of conviction of each count of a ten-count indictment charging him with perjury (18 U. S. C. A. section 1621).

Affirmed.

Appendix A

CHARLES H. MILLER, Assistant United States Attorney, Southern District of New York, N. Y. (Paul W. Williams, United States Attorney, Southern District of New York, George I. Gordon, Assistant United States Attorney, Southern District of New York, N. Y., on the brief), *for Plaintiff-Appellee.*

JOSEPH LEARY DELANEY, Esq., New York, N. Y. (Delaney & Donoghue, New York, N. Y., on the brief), *for Defendant-Appellant.*

MOORE, *Circuit Judge*:

The appellant, Sam Courtney, appeals from a judgment of conviction after a trial before a jury on charges of perjury. The indictment contained ten counts, the essence of which was that appellant testified falsely before a Grand Jury investigating violations of labor racketeering and conspiracy laws as well as other federal criminal statutes. More specifically the Government charged that it was material to its investigation that it ascertain the disposition made of the sum of $395.03 carried on the books of the Courtney Trucking Company, of which appellant was the senior partner, for the week ending June 22, 1956, and whether this sum was given in whole or in part to elevator starters and operators in various buildings, and to employees of various packing houses in the New York City garment district as testified to by appellant. The indictment alleged that appellant well knew and believed that his testimony was not true in that he had not paid out, during the week ending June 22, 1956, the sum so recorded

on the books. The Government called a large number of witnesses, most of whom (sixty-one in number) were employees of the packing houses, and elevator starters and operators in the buildings where appellant claimed, in his grand jury testimony, that he had distributed these monies during the week in question. These witnesses testified that they had not received any payments from appellant during that week.

The $395.03, concerning which appellant was questioned, was attributed, on the Courtney Trucking Company books, to "Garage, Gas & Oil." Such an account had been maintained since the inception of the firm in 1950, but there were no vouchers showing for what purposes approximately $300 to $500 credited weekly to this account was being expended. Appellant's explanation did not relate to garage, gas or oil. As a witness before the Grand Jury he was most specific, stating that he personally had paid out this sum in tips and gratuities to freight elevator and packing house employees in five buildings and five packing houses. Each count of the indictment dealt with one of these five buildings or packing houses.

The special Grand Jury before which appellant testified had been impaneled to investigate charges of racketeering in the garment and trucking industries, payments to union officials for "protection" and federal income tax violations. Any payments by appellant or his firm for purposes which might have resulted in violations of Federal laws were material to the investigation.

Appellant does not on appeal make any claim that his testimony concerning his disposition of the $395.03, during the week of June 22, 1956, was not perjurious, or that he

was not guilty as charged. Instead he relies entirely on three alleged errors during the trial, namely, that (1) the trial court admitted evidence as to matters which took place prior to the week ending on June 22, 1956; (2) the trial court refused to strike allegedly prejudicial surplusage from the indictment, and (3) the trial court refused to declare a mistrial when the prosecutor mentioned in his opening statement that appellant had refused to answer certain questions before the Grand Jury, thus creating a prejudice which could not have been cured by the trial court's instructions and ruling.

1. *The "Garage, Gas & Oil" Account.*

Appellant correctly asserts that the indictment is limited to expenditures by appellant during the week of June 22, 1956 about which he testified before the Grand Jury on June 26, 1956. The narrowness of the issue was twice emphasized by the trial court, who said:

> "The only thing we are trying here is an issue of perjury, whether the defendant in testifying before the grand jury testified falsely, knowingly and intentionally. Those statements were statements with reference to moneys which he said he paid out to various elevator operators and starters at various places of busines in the week ending June 22, 1956."
>
> "* * * all we are concerned with is whether the defendant testified falsely before the grand jury with respect to the events of that week."

Although the perjury was related to expenditures during a particular week in the life of the "Garage, Gas & Oil"

account, this circumstance does not preclude the introduction of the history of this account, its purpose and use and appellant's knowledge thereof. Only against the background of the account as it was carried throughout the previous years could the jury properly appraise the credibility of appellant's story of tips and gratuities. It was appellant himself who chose to give this explanation. After hearing the asserted objects of appellant's benefactions deny that they had received his bounty, the jury found appellant guilty. No error in the court's charge is asserted here. It clearly defined the issue to be resolved, namely, did appellant tell the truth when attempting to explain his disbursements from that account during that specific week. The jury said no.

The rather questionable character of the "Garage, Gas & Oil" account was not brought out to convict appellant of other or different crimes as he intimates, but rather because he selected this account as the foundation for his explanation. The cases which he cites deal with situations where the objectionable proof suggested other offenses and hence was prejudicial.

The question addressed to appellant's accountant asking his opinion as to maintaining an account without supporting vouchers would better have been unasked and unanswered because whether it was good accounting practice or poor practice would not bear upon the issue of the truth or falsity of appellant's Grand Jury testimony. However, a single incident such as this during the course of the trial can scarcely be considered to be prejudicial or reversible error.

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2. *Alleged Prejudicial Surplusage.*

The matter which appellant would strike from the indictment was neither inflammatory nor prejudicial. The bracketed material added to the quoted testimony was explanatory and actually tended to clarify rather than to confuse. Materiality being a part of the Government's case, there was no error in the trial court's failure to strike any portions of the indictment relating to this issue. Furthermore the trial court is allowed wide discretion in coping with such motions.

3. *The Motion for a Mistrial.*

In his opening the prosecutor told the jury that when appellant was asked for the names of persons to whom he "gave out this money" appellant (before the Grand Jury) refused to answer. Appellant's counsel thereupon moved for a mistrial. The trial court then said:

> "Certainly the question as to whether he has refused to answer has nothing to do with this case and nothing to do with this jury. The only question we have here is whether he gave false testimony before the grand jury, and I will so instruct this jury."

In denying the motion for a mistrial he added:

> "I think the jury understands perfectly that the only issues before this jury are whether he gave false testimony. The witness under certain circumstances has a perfect right to refuse to answer questions before the grand jury. Whether he did or not has no bearing upon the issues before this jury."

The trial court's instruction to the jury was so immediate and so direct that there can be no basis for error developed

from this incident nor any presumption that the jury would wilfully disregard his admonition. The jury was told that:

> "Whether this was a grand jury investigation into racketeering or anything else that might come before a grand jury has no bearing upon this question, which is purely a question: Did the man intentionally lie before the grand jury? That is the only question before this jury here, and therefore the jury will put out of their mind any question as to whether this was racketeering. It might be any one of numerous problems that the grand jury is looking into, and whether the man refused to answer has no bearing upon that question. A man has a right at certain times to refuse to answer before a grand jury, and it is not for me or this jury to consider that in connection with this case."

At the end of the entire case the court asked defense counsel if he wished further instructions on the subject. Counsel, however, said: "* * * to further say something about it now I think would be emphasizing something that might not be any longer in their minds." The court offered to "charge the jury to disregard it and that the witness had a perfect right to refuse to answer the particular questions and that it has no bearing upon this particular case whatsoever." The court agreed that he would not mention it again in his charge and defense counsel seemed satisfied that "what was said by either counsel has nothing to do with the case."

None of the errors asserted constitutes grounds for reversal.

Judgment affirmed.

Appendix B

Section 1621 of Title 18, United States Code, reads as follows:

> "Section 1621 Perjury Generally.
>
> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorized an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000.00 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773."

Appendix C

The Grand Jury charges:

1. On or about the 26th day of June, 1956, in the Southern District of New York, Sam Courtney, the defendant herein, having duly taken an oath before a competent tribunal, to wit, the Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Southern District of New York, and inquiring for that District, in a case then and there pending before said Grand Jury, in which a law of the United States authorizes an oath to be administered, that he would testify truly, unlawfully, wilfully and knowingly and contrary to said oath, stated material matter which he did not believe to be true.

2. At the time and place aforesaid, the said Grand Jury inquiring as aforesaid, was conducting an investigation entitled, *United States* v. *John Doe,* pertaining to possible violations of racketeering and conspiracy laws of the United States and other federal criminal statutes.

3. It was material to this investigation to ascertain: (a) the disposition made of the sum of $395.03 carried on the books of the Courtney Trucking Company as an expense account for the week ending June 22, 1956; (b) whether monies from the said account were given in that week by the said Sam Courtney to the freight elevator starters and freight elevator men at 463 Seventh Avenue, New York, N. Y.

(1152) 4. at the time and place aforesaid, the said Sam Courtney duly appeared as a witness before the said

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Grand Jury and then and there, being under oath as aforesaid, and, having testified as follows:

"Q. Will you tell us, sir, for what purposes you, Mr. Senter and Mr. Ritter spend expense money? A. The major portion of the expense money that Mr. Senter and myself spent are for gratuities that we give out to every building in the garment center. We give to every packing house in the garment center, some policemen, and a few other people that we have to do business with. We give it out daily, weekly. We are always giving it out. That is the major portion of it. Mr. Ritter might take some expense money for some entertainment.

Q. To be sure that I understand you, sir; you say that the major portion is spent by you and Mr. Senter for gratuities? A. That's right.

• • • • •

Q. Where else do you give out money? A. Most of the buildings that we go into.

Q. We understand that we are talking about money that you give out personally? A. That's right.

Q. Tell us, sir, where you give out money? How many buildings? A. We have—we go into practically every building in the garment center.

Q. How many buildings do you visit a week to give out money? A. I might go into fifty buildings a week.

Q. You personally? A. That's right.

Q. You personally go into fifty buildings a week; is that correct? A. That's right.

Q. That would be approximately ten buildings a day; is that correct? A. That's right.

• • • • •

Appendix C

Q. How will you expedite him [your employee]? A. We generally take care of most of the starters in the building. We generally take care of a lot of the elevator men.

Q. When you speak of starters and elevator men you would be talking about freight elevator men; is that correct? A. That's right.

Q. Nothing to do with passenger elevators? A. Nothing to do at all.

• • • • •

(1153) Q. How many buildings do you go to a week, sir? Would you say fifty? A. I would say fifty buildings a week counting the buildings that I might go into two or three times.

Q. How many separate payments do you make a week, sir? A. Offhand, exactly I don't know, but—

Q. Approximately? A. Approximately I would say I give out about fifty payments a week.

Q. That is in these buildings; is that correct? A. That's right.

Q. How much do you give out in each payment, sir? A. I can give one man $1, another man $2. It's generally not in excess of $2.

Q. Will you give us the total average amount which you give out in these buildings each week? A. I would say about $50 average.

• • • • •

further testified with respect to the aforementioned material matter as follows:

Q. Will you give us, sir, the buildings that you visited last week? A. 463 7th Avenue.

• • • • •

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Q. Give us any buildings you recall that you visited last week. A. 462 7th Avenue; 463 7th Avenue, maybe seven or eight times; 1375 Broadway, 1400 Broadway, 501 7th Avenue, several times last week.

Q. Did you visit any other buildings last week? A. I might have, Mr. Wachtel, but those are the ones that I remember.

Q. In other words, you definitely remember that you visited 463 7th Avenue seven or eight times last week? A. That's right, easily.

Q. When you say 'visit' you mean you paid out money seven or eight times? A. Yes."

The said Sam Courtney then and there well knew and believed that the aforementioned testimony was not true, in that he had not paid out such monies to the freight elevator starters and freight elevator men at 463 Seventh Avenue, New York, N. Y., in the week ending June 22, 1956.

(Title 18, Section 1621, United States Code).

Appendix D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of October, one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK, *Chief Judge,*
HON. JOHN C. PICKETT,
HON. LEONARD P. MOORE, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

SAM COURTNEY,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk